

September 30, 2005

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St, SW
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
Children's Television Obligations of Digital Television Broadcasters
MM Docket No. 00-167**

Dear Ms. Dortch,

On September 29, 2005, Bert Carp of Williams and Jensen, Bruce Sokler of Mintz, Levin, Susan A. Mort, Counsel for Time Warner Inc., and the undersigned met separately with: (1) Jordan Goldstein, Senior Legal Advisor to Commissioner Copps; (2) representatives of the Media Bureau, including Donna Gregg, William Johnson, Deborah Klein, Barbara Kreisman, Mary Beth Murphy, John Norton, Kim Matthews, Jane Gross, Erik Stallman; and (3) Heather Dixon, advisor to FCC Chairman Kevin Martin. In these meetings, we discussed issues relating to pending petitions for reconsideration filed by Turner Broadcasting System, Inc. ("Turner") and The WB Television Network ("The WB") in the above-captioned docket.

Last year, the Commission amended its regulations adopted pursuant to the Children's Television Act (the "CTA"), *inter alia*, by: (1) establishing criteria that websites must meet if on-air references to such sites during children's television programming material are not to be considered commercial matter subject to the applicable commercial time limits, (2) prohibiting any on-air reference to websites that contain "host-selling," and (3) altering the definition of "commercial matter."¹ These regulations are scheduled to become effective January 1, 2006. Several parties, including Disney, Discovery, Fox, 4Kids Entertainment, NCTA, Turner, Viacom, and The WB (collectively, the "Industry Parties"), filed Petitions for Reconsideration ("Petitions") of these regulations, which are currently pending at the FCC.

Since the time the Petitions were filed, the Industry Parties worked diligently to develop a serious and thoughtful proposal for Commission consideration that would both achieve the Commission's goals and be more workable as a business matter than the rules subject to the reconsideration petitions. Toward this end, the Industry Parties devoted a significant amount of time to a series of meetings and conference calls. These meetings and calls, as well as the extensive preparatory work in which the participants engaged, represented a substantial commitment on the part of the Industry Parties to developing

¹ Children's Television Obligations of Digital Television Broadcasters, 19 FCC Rcd 22943 (2004).

constructive recommendations for the Commission. The Industry Parties also sought the input of interested children's advocacy groups (the "Advocacy Groups"). Turner and The WB appreciate the time and consideration the Advocacy Groups gave to the industry proposal. We hope to continue a constructive dialogue with the Advocacy Groups in the future on issues of mutual concern.

In recognition of the upcoming implementation deadline and the substantial interpretive issues raised in the Petitions, Turner and The WB are committed to work with the Commission staff to clarify the regulations in advance of their effective date in order to develop more workable standards that meet the objectives of the CTA. Toward that goal, we offer the following proposal to the Commission. Turner and The WB stand ready to meet with the Commission staff to discuss this proposal in detail and to answer any questions they might have.

I. Website-Related Rules

The Commission's amended regulations include two new provisions relating to the display of Internet website addresses during children's programming. The first establishes a set of criteria that websites must meet to avoid on-air references to them from being considered commercial matter subject to the applicable commercial time limits.² The second is a blanket prohibition on any on-air reference to websites that contain "host-selling."³ Below we outline the practical interpretive questions raised by these new rules and offer a comprehensive proposal designed to address them. We believe that the proposal serves the Commission's goal underlying both the website rule and the host-selling rule, and ask that the Commission replace its four prong test with a new rule set forth in Section I.C below.

A. Display of Internet Website Addresses and Commercial Time

The Commission's new rules permit the display of Internet website addresses during children's program material where the website meets four conditions: (1) it offers a substantial amount of *bona fide* program-related or other noncommercial content; (2) it is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) its home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page to which viewers are directed by the website address is not used for e-commerce, advertising, or other

² 47 C.F.R. §§ 73.670(b), 76.225(b).

³ *Id.* §§ 73.670(c), 76.225(c).

commercial purposes.⁴ The first two prongs of this test are unclear as to their scope and raise a number of practical and interpretive questions. For example, how broadly does the Commission define the term “website?” What constitutes a “substantial amount of *bona fide* program-related or other noncommercial content?” How will the Commission determine whether a website is “primarily intended for commercial purposes?” These questions highlight the difficulties faced by industry in understanding and complying with the Commission’s new rules.

B. Website Host-Selling

The new Commission rules also include a prohibition on the on-air display - during a program or in commercial time - of a web address if the referenced website “uses characters from that program to sell products or services.” In enacting this rule, the Commission sought to extend the principles underlying its existing prohibition on television host-selling to websites. However, because the new rule does not define host-selling in the context of a non-linear, dynamic, and multi-page environment like an Internet website, and since the principles applicable to television host-selling are not readily adaptable to such an environment, there is substantial industry confusion regarding the rule’s scope. Indeed, the new rule raises a number of practical interpretive questions that make it difficult for the industry to understand what might constitute compliance. The lack of clarity on these issues also is likely to result in implementation and enforcement difficulties for the Commission.

In the linear television context, host-selling is defined as “the use of program characters or show hosts to sell products in commercials during or adjacent to the shows in which the character or host appears.” The key principles underlying this definition are adjacency and time. A television advertisement constitutes host-selling only if a character appears in an ad immediately before, during, or after television programming featuring that character. Conversely, television host-selling does not exist if the same television ad airs during the next television show in which the character is not featured. The Commission has allowed networks and stations to air advertisements containing character-related products and pitches in this manner out of a recognition that they provide a source of economic support for children’s programming.

In the context of Internet websites, however, the principles of adjacency and time do not apply in the same manner. As an initial matter, there is a natural separation between the display of a web address on television and the distinct act of accessing a computer to visit the referenced address that reduces the chance of any potential confusion. Indeed, there may be a significant time delay between these two events.

Another key question relating to the concept of adjacency again turns on how broadly the Commission defines the term “website.” Beyond the web page located at the specific address referenced on television, how far does the intended concept of “website”

⁴ *Id.* §§ 73.670(b), 76.225(b).

extend? Does “website” mean a particular domain name and the thousands of pages contained within that domain name? Does it implicate websites with different domain names that are somehow linked, even 100 “clicks” away, to the web address referenced on television?

In addition, the inherent structure of most website pages lends itself to any number of different scenarios which raise other interpretive questions under this new website rule. Depending on the level of “use,” proximity, or connection of the program characters to the commercial content on a given web page, it could be interpreted to trigger the Commission’s new rule. Indeed, the existing rule is potentially so broad it could force networks and stations to either remove characters from their websites altogether or refrain from referencing their websites on-air. For example:

- What if the character appears as an icon for navigation, or in noncommercial content, on the same page as an advertisement for unrelated products or services (where the ad is completely separated from the noncommercial content and labeled as an ad)?
- Would inclusion of character images and artwork within or near an e-commerce area be considered an indirect endorsement or use of the character to sell the product?

These difficult questions illustrate the challenges inherent in extending regulatory principles from a linear medium to a non-linear one and understanding the scope and implications of the new rule.

C. Website Proposal

The fundamental concepts underlying the Commission’s implementation of the CTA are: (1) clear separation between program content and commercial material, and (2) clear identification of commercial material. The detailed website proposal described below meets these objectives in a technically and financially feasible manner. Recognizing that the Internet is a non-linear, dynamic medium and that a website can

This proposal also serves the Commission’s goal of protecting children by creating a safe harbor with respect to website addresses displayed on-air. Because a visitor accessing a website referenced during children’s programming would not view any commercial matter until after they visited the landing page and the subsequent buffer page, and then provided an affirmative opt-in to access pages containing advertising or other commercial matter, there is sufficient separation from viewing the web address on-air to alleviate any concerns about adjacency as it relates to host-selling. This approach not only serves the Commission’s goal of protecting children, but would also avoid

immersing the Commission in the sorts of difficult questions outlined above. We believe that this proposal is an optimal solution addressing the concerns of the Commission and of industry and one which obviates the need for a specific rule addressing host-selling.

To that end, we propose that the display of, or references to, Internet website addresses on-air during children's television programming material should not be considered "commercial matter" where the following conditions are met:

A. Landing Page

- (1) The page to which the viewer is directed (the URL of which is chosen by the program network and may vary) will contain no advertising or commercial matter, or direct links to any e-commerce sections such as online shops.
- (2) The page to which the viewer is directed will contain relevant and substantial bona fide television programming-related content.

B. Landing Buffer Page

- (1) The next click off the landing page will be mediated by a buffer ("landing buffer page") that contains no advertising, commercial material, or links to e-commerce sections such as online shops.
- (2) The landing buffer page will be a notification page containing no other language or copy other than a simple notice that the user is entering a portion of the website that contains advertising and commercial matter.
- (3) The landing buffer page will provide viewers with two options: (a) an affirmative opt-in to proceed to the next page which may contain commercial matter (*e.g.*, "Click OK if you wish to proceed"), and (b) an affirmative opt-out which would allow them to return to the commercial-free landing page (*e.g.*, "Click back if you wish to return").
- (4) The next click from the landing buffer page would take the user to web pages that may contain ads and commercial links.

C. Other Notification Pages

There will be notification pages between any third party ads and their corresponding sites ("advertising notification page"). These advertising notification pages will advise users that they are going to a third-party commercial website. The look and feel of these advertising notification pages will be different from the landing page buffer.

D. Advertising Separation and Identification

Commercial matter (*e.g.*, advertisements, sponsorships, or e-commerce opportunities) will be clearly separated from non-commercial content and appropriately labeled so that children can distinguish between the two.

- (1) There will be clear notification that discloses what areas of the websites are sponsored and by whom.
- (2) All advertising will have discernable visual separation from editorial content and/or identification of the advertisement (*e.g.*, ad slugs, bumpers, borders, and/or sponsor identification) in an appropriate method for the advertisement.
- (3) Video ads in video streams will be preceded and followed by bumpers. In addition, all rich media ad units (*i.e.*, advertisements that integrate some component of streaming video and/or audio with interactivity) will carry a visible and functional close button, or some other user-initiated close functionality, for the entire duration of the display that is both easy to use and clearly understandable for children.

E. Awareness Initiative

Each website also will have a page that lists the foregoing measures and explains their intent to parents as an industry-wide audience educational initiative.

II. **Definition of Commercial Matter**

With the exception of the promotion of educational and informational (“E/I”) programs, the new Commission regulations would for the first time count promotions of other television programs on the same station or network during children’s programming against the applicable CTA commercial limits. We believe that this change is: (1) inconsistent with Congress’ intent when it passed the CTA and 30 years of Commission precedent exempting promotions by a station or network for its own programming, and (2) unsupported by any evidence of harm or injury caused by such promotions. The new “commercial matter” definition also raises substantial interpretive questions and overwhelming operational challenges that not only make industry compliance by the end of the year difficult, but also that could result in the unintended consequence of reducing the amount of entertaining television programming that is appropriate for children in the future.

As the Commission knows, the number of advertising minutes available per hour of children’s programming represents a finite amount of air-time. This limited amount of advertising time is used to generate revenue, which is then reinvested into programming

development. For the past 30 years since the CTA was adopted, the promotion of children's programming on the same network – which is vital to informing viewers of its availability – fell outside that advertising time. As a result of the recent rule change including promotions within the definition of “commercial matter,” however, television networks and stations featuring children's programming will be forced to elect whether to devote their finite advertising air-time inventory to advertising, or to promotion. This election imposes a Hobson's choice on the networks: either lose millions of dollars in advertising revenue used to pay for the development and licensing of children's programming, or forgo promoting that programming during their children's lineup and suffer the loss of viewers because the network cannot make them aware of other children's offerings.

The anticipated negative financial impact of this choice is staggering – over the next five years, hundreds of millions of dollars could be cut from the revenue available to develop, acquire, and promote children's programming, based upon publicly-available estimates of advertising revenue in children's television programming and current promotional practices. The ultimate effect of this new regulation on networks that predominantly carry children's programming is particularly harsh, as they have no other opportunity to inform viewers of such programming. This not only undermines the economic viability of children's programming, but ultimately serves as disincentive for television networks to invest in programming that is appropriate for children's entertainment and development. Furthermore, the new definition of commercial matter does not recognize the public interest, convenience, and value to parents and children of receiving scheduling information which informs them about the availability of entertaining programming appropriate for children.

Television networks and stations also face significant operational challenges resulting from the new definition of commercial matter. Based upon the traditional length of television program formats, including those for children's programs (44 to 45 minutes of time per hour, with animated programs running between 11 and 22 minutes), and the allowable commercial time per hour for children's programs (10.5 to 12 minutes per hour), television networks and stations generally have up to 3 to 4 minutes per hour of extra time to fill in to avoid “dead air.” Promotional spots are often used for this purpose. Networks and stations are now grappling with the issue of how to fill these gaps with respect to their vast libraries of existing children's programming if they are unable to do so by providing scheduling information through on-air spots. Replacing existing programming libraries with programs of longer duration, or the production or licensing of supplemental minutes of children's programming, would involve significant expense and time. In addition, it is unclear whether other materials such as program packaging, bugs, and voiceovers would constitute “promotions” under the new rule if they were used to pass along scheduling information to viewers. To the extent these types of materials were considered to be promotions, it would exacerbate the already substantial negative operational impact on networks and stations, and reduce the availability of scheduling information available to parents and children for age-appropriate children's programming.

In order to ensure the continued development and support of children's television programming, and to increase public awareness of the availability and scheduling of such programming, we ask that the Commission reinstitute its previous definition of commercial matter.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this notice is being filed electronically in the above-captioned proceeding for inclusion in the public record. Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "St. Teplitz", written in a cursive style.

Steven N. Teplitz
Vice President and Associate General Counsel

cc: Jordan Goldstein
Donna Gregg
William Johnson
Deborah Klein
Barbara Kreisman
Mary Beth Murphy
John Norton
Kim Matthews
Jane Gross
Erik Stallman
Heather Dixon

ATTACHMENT

PROPOSED REVISED REGULATIONS

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

Part 73 RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, and 336.

2. Section 73.670 is amended to remove paragraph (c) and revise paragraph (b) and Note 1 to read as follows:

Section 73.670 Commercial limits in children's programs.

* * * * *

(b) The display of or reference to Internet website addresses during program material is permitted only if: 1) the page to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no direct links to another page with commercial material); 2) the page to which viewers are directed by the website address offers a substantial amount of *bona fide* program-related or other noncommercial content; and 3) the website clearly distinguishes advertising and e-commerce sections from noncommercial content.

Note 1: *Commercial matter* means air time sold for purposes of selling a product or service.

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Part 76 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

Part 76 MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, and 573.

2. Section 76.225 is amended to revise paragraph b, remove paragraph c, redesignate paragraph d as c, and revise Note 1 to read as follows:

§ 76.225 Commercial limits in children's programs.

* * * * *

(b) The display of or reference to Internet website addresses during program material is permitted only if the website: 1) the page to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled “store” and no direct links to another page with commercial material); 2) the page to which viewers are directed by the website address offers a substantial amount of *bona fide* program-related or other noncommercial content; 3) the website clearly distinguishes advertising and e-commerce sections from noncommercial content.

(c) This rule shall not apply to programs aired on a broadcast television channel which the cable operator passively carries, or to access channels over which the cable operator may not exercise editorial control, pursuant to 47 U.S.C. 531(e) and 532(c)(2).

Note 1 to § 76.225: *Commercial matter* means air time sold for purposes of selling a product or service.

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